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No. 648

IN THE

SUPREME COURT OF THE UNITED STATES

1948 TERM

EARNEST DEWAR, PETITIONER,

v.

WALTER A. HUNTER, WARDEN, UNITED STATES PENITENTIARY, LEAVENWORTH, KANSAS, RESPONDENT.

PETITIONER'S REPLY TO RESPONDENT'S BRIEF IN OPPOSITION TO CERTIORARI.

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Respondent has filed brief in opposition to certiorari. We thank the Honorable Court for granting petitioner leave to reply.

DUE PROCESS.

Here is the case of a soldier who enlisted and served for five years with honor to his country and to himself. Suddenly, he was accused of an attack upon a German civilian. This accusation was made at a point 100 miles from the scene of the alleged attack, and he was carried

along with the Army at least 200 miles farther away from the scene for his trial. Following another war and widespread criticism of Army Courts-Martial, and after hearings conducted by two committees appointed by the Army and War Department, and a committee appointed by the American Bar Association, and after extended Congressional hearings and consideration, Congress enacted for the first time, Article of War 70. It was designed for the protection of DeWar, and others charged with a General Court-Martial offense. At the 1920 hearings before Congress the Judge Advocate General Crowder and Acting Judge Advocate General S. T. Ansell, testified. Ansell had been in charge of Military Justice during the war, and had championed the rights of the enlisted soldier. Ansell drafted the bill which included Article 70. With all this knowledge and history within the Judge Advocate General's Department, that department, when the question first arose, held that substantial compliance with Article 70 was jurisdictional. This interpretation was followed for 20 years.

The District Court found that DeWar requested the right to confront and question the Germans and his request was refused. And there was no semblance of thorough and impartial investigation.

If this Honorable Court now accepts respondent's contention, and denies to this American combat soldier, convicted upon the testimony of the German disciples of Hitler, the protection of the statute, enacted for his specific benefit, it will amount to the nullification of the great decisions of the Court which have done so much

to preserve the confidence of the common citizen in his government as one where freedom and individual rights are determined and protected by law and not by men.

Failure to follow Article 70 constitutes a denial of due process, and the Court said in the Glasser case, 315 U. S. 60, 76, that it will not speculate on the degree of prejudice, but will enforce the right.

CONSTITUTIONALITY OF ARTICLES.

The Court should review this case and declare the Articles of War unconstitutional. This could result in the enactment of Articles of War which would divorce Courts-Martial and the Judge Advocate General's Department from Army Command and assure a fair trial of a soldier brought before a Court-Martial. DeWar's Court, as required by law, was made up of officers named by the Commanding General of the 5th Infantry Division. This same appointing authority named the prosecuting attorneys, the defense counsel, passed upon the sufficiency of the evidence to require trial, referred the charges to the Court for trial, and reviewed the record after trial. He was the symbol of discipline and authority in the division. This same Commanding General controlled the members of the Court in their assessments, their efficiency ratings and promotions. The Articles of War result in indirect influence upon every Court-Martial in violation of the rule established by the decisions in *Tumey v. Ohio*, 273 U. S. 510, 71 L. Ed. 749; and *Craig v. Harney*, 331 U. S. 367, 91 L. Ed. 1546.

By reason of the foregoing considerations, DeWar, who had been denied the protections of the statute, was convicted before evidence had been introduced at his trial. This is evidenced by the record of trial by Court-Martial, pages 5 and 52 (CMR 63 and 110) where the President of the Court-Martial in effect gave testimony concerning the provisions of an order forbidding fraternization with German civilians. This testimony by a member of the Court was forbidden by Article of War 8 (10 U. S. C. 1479) which provides that—

> "No officer shall be eligible to sit as a member of such court when he is the accuser or a witness for the prosecution."

In conclusion, we respectfully submit petitioner's case with confidence that the law will be applied and that he will receive justice at the hands of this Honorable Court.

Respectfully submitted,

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